IRAWADI MOHAMMAD

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
SULAIMAN DAUD JCA
CLEMENT SKINNER JCA
[CRIMINAL APPEAL NO: B-05-310-2009]
1 JUNE 2012

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Circumstantial evidence - Ingredients of charge - Whether prosecution proved case beyond reasonable doubt - Whether trial court's decision prejudicial towards appellant - Whether retrial warranted*

CRIMINAL PROCEDURE: *Trial - Retrial - Appellant convicted of murder - Penal Code, s. 302 - Trial heard before three different judges - First trial judge heard prosecution witnesses before being posted out to another place - Second trial judge ruled prima facie case established and ordered appellant to enter defence - Third trial judge again ruled prima facie case established notwithstanding earlier ruling by second trial judge - Whether third trial judge misdirected himself - Whether appellant prejudiced - Whether trial court's decision warranting retrial - Whether ingredients of charge established*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether trial judge required to give reasons when ruling that a prima facie case has been established - Criminal Procedure Code, s. 180*

This was an appeal by the appellant against the decision of the High Court in convicting him for murdering the deceased under s. 302 Penal Code whereby the mandatory death sentence was imposed upon him. The trial of this case commenced in October 2005 whereof the first trial judge, after having heard all twenty prosecution witnesses for this case, was posted to Putrajaya. In 2008, upon the case being transferred to another court, the second trial judge ruled that the prosecution had proved a *prima facie* case against the appellant and called upon the latter to enter his defence. There was no record of the second trial judge's reasoning in the notes of evidence neither were there any written

A grounds to it. On this basis, the appellant contended that the second trial judge did not have the benefit of hearing the prosecution witnesses in arriving at the decision which she did. Records then showed that the second trial judge was no longer serving at the said High Court on the continued hearing date. The B case was then called before the third trial judge who had heard the defence case and at the end of the trial, concluded with a finding of guilt and conviction against the appellant. In this appeal, the appellant submitted, *inter alia*, that: (i) the third trial judge had misdirected himself when he ruled in his written grounds that the C prosecution had proved a *prima facie* case when there already existed an earlier ruling by the second trial judge on this matter; (ii) the entire trial was a mistrial as the appellant had been deprived of the second judge's reasoning; (iii) the appellant had been deprived of a fair trial; (iv) the appellant had been D disadvantaged as he did not know why his defence was called by the second judge who only heard submissions and did not have the audio-visual advantage of hearing the prosecution witnesses; and (v) the third trial judge's finding was flawed as he did not have the benefit of hearing the prosecution witnesses' testimony. E The issue which arose for determination herein was whether the error or irregularity complained of was of such a nature that it could be considered to be fatal and prejudicial to the appellant and warranting a retrial.

F **Held (dismissing appeal; affirming decision of High Court)**
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) A fresh trial means that everything would have to start afresh. All evidence are required to be tendered afresh to be decided upon by a new trial judge. There is no given yardstick to guide G an appellate court as to when it should, or should not order a retrial. Further, the interest that is to be served by the power to order a retrial must be in the interests of the public and it is best served if persons who are guilty of serious crimes are brought to justice and not allowed to escape H because of technicalities in the conduct of the trial. (paras 14 & 15)

(2) Generally, under s. 180 of the Criminal Procedure Code, a trial judge is not required to give his reasons when ruling that a I *prima facie* case has been established against a person. The second trial judge, when ruling that a *prima facie* case had

been made out against the appellant, had expected, in all probabilities, to be able to give her reasons for doing so when she writes her judgment at the conclusion of the case. However, the third trial judge took over the hearing of this case until its conclusion. Hence, these two rulings were not of such a feature and nature that vitiated the whole trial or caused a miscarriage of justice. (para 18)

(3) It was incumbent on the third trial judge at the conclusion of the defence case to: (i) reasonably, properly and judicially consider the defence in the light of the prosecution's case; (ii) come to a decision on the totality of the evidence adduced before the court; and (iii) arrive at a decision whether the prosecution had proved its case beyond reasonable doubt. It was for these reasons the third trial judge did what he did, to appraise the evidence for the prosecution in light of the defence evidence and to then test the impact of the latter on the former to determine whether the defence had succeeded in raising a reasonable doubt in the prosecution's case. (para 20)

(4) The prosecution had clearly proved the first ingredient of the charge. Sufficient circumstantial evidence showed that it was the appellant who had stabbed the deceased. The non-recovery of the knife used to stab the deceased was not fatal in view of the third trial judge's acceptance of the prosecution witnesses' testimony that the appellant was seen holding a knife on the date and time in question, and had ran away with a blood stained knife. Taken as a whole, the third trial judge was right in his reasoning that the evidence all pointed to the conclusion that the appellant was the person who had stabbed the deceased. Further, the statement of the deceased to the medical officer that it was the appellant who had attacked her was correctly ruled as a dying declaration. (paras 22, 23 & 26)

(5) The depth and nature of the injury caused showed that the injury was intentionally inflicted on the deceased by the appellant and not accidental. The third trial judge's appraisal of the evidence was correct and so too were the findings which he arrived at. Further, the defence was rightly called by the second trial judge for the reasons stated by the third trial judge. (para 28)

(6) The third trial judge was right in rejecting the appellant's defence that he had no intention to kill the deceased as fictional and had also correctly assessed the totality of the case in arriving at the conclusion which he did. Hence, the third trial judge had directed his mind on the right issues and had drawn correct inferences from the proved and admitted facts. (paras 29 & 30)

[Case against the appellant had been proved beyond any reasonable doubt].

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dalam mensabitkan perayu di bawah s. 302 Kanun Keseksaan atas pembunuhan si mati di mana hukuman mati mandatori telah dijatuhkan terhadapnya. Perbicaraan kes ini telah bermula pada Oktober 2005 dimana hakim perbicaraan pertama, selepas selesai mendengar kesemua dua puluh saksi pihak pendakwaan, telah ditempatkan ke Putrajaya. Pada tahun 2008, dengan kes ini dipindah ke mahkamah lain, hakim perbicaraan kedua memutuskan bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap perayu dan memanggilnya untuk memasuki pembelaan. Tiada rekod pendapatan hakim perbicaraan kedua di dalam nota keterangannya mahupun sebarang alasan bertulis terhadapnya. Atas dasar ini, perayu berhujah bahawa hakim perbicaraan kedua tidak mempunyai manfaat untuk mendengar saksi-saksi pihak pendakwaan dalam mencapai keputusannya. Rekod menunjukkan bahawa hakim perbicaraan kedua tidak lagi bertugas di Mahkamah Tinggi tersebut pada tarikh penyambungan perbicaraan. Kes ini kemudiannya dipanggil di hadapan hakim perbicaraan ketiga yang telah mendengar kes pihak pembelaan dan pada akhir perbicaraan, menyimpulkan dapatan bersalah dan sabitan terhadap perayu. Dalam rayuan ini, perayu berhujah, antara lain, bahawa: (i) hakim perbicaraan ketiga tersalah arah apabila memutuskan di dalam alasan bertulisnya bahawa pihak pendakwaan telah membuktikan satu kes *prima facie* sedangkan telah wujud perintah awal hakim perbicaraan kedua berkenaan perkara ini; (ii) keseluruhan perbicaraan adalah satu perbicaraan silap memandangkan perayu tidak berpeluang melihat dapatan hakim perbicaraan kedua; (iii) perayu dihalang daripada satu perbicaraan adil; (iv) perayu berada dalam keadaan merugikan apabila beliau tidak mengetahui kenapa pembelaannya dipanggil oleh hakim perbicaraan kedua yang hanya

mendengar penghujahan dan tidak berpeluang untuk melihat dan mendengar saksi-saksi pihak pendakwaan; dan (v) hakim perbicaraan ketiga khilaf dalam dapatan kerana tidak mempunyai peluang untuk mendengar keterangan saksi-saksi pihak pendakwaan. Isu yang berbangkit di sini adalah sama ada kesilapan atau salah aturan yang diadu bersifat sebegitu rupa sehingga ianya boleh dianggap sebagai menjejas dan memprejudiskan perayu yang mewajarkan satu perbicaraan semula.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Satu perbicaraan baru bermakna kesemuanya akan bermula dari awal. Semua keterangan perlu dikemukakan semula bagi diputuskan oleh hakim perbicaraan baru. Tiada kayu ukur tertentu wujud untuk membimbing mahkamah rayuan bila ia perlu, atau tidak memerintah satu perbicaraan semula atau sebaliknya. Lagi pun, kepentingan yang perlu dilaksanakan oleh kuasa untuk memerintah perbicaraan semula mestilah bagi kepentingan awam dan ini boleh dilaksanakan dengan sebaiknya jika orang yang bersalah bagi jenayah serius dibawa ke muka pengadilan dan tidak dibenar melepaskan diri atas alasan teknikal dalam perbicaraan.

(2) Pada amnya, di bawah s. 180 Kanun Tatacara Jenayah, hakim perbicaraan tidak semestinya perlu memberi alasannya apabila memutuskan bahawa satu kes *prima facie* telah dibuktikan terhadap seseorang. Hakim perbicaraan kedua, apabila memutuskan bahawa satu kes *prima facie* telah dibuat terhadap perayu, telah menjangka, dalam semua kebarangkalian, untuk memberi alasannya apabila beliau menulis penghakimannya pada akhir kes. Walau bagaimanapun, hakim perbicaraan ketiga telah mengambil alih pendengaran kes ini sehingga ke akhirnya. Oleh itu, kedua-dua keputusan itu bukanlah mempunyai sifat yang boleh mencacatkan segala perbicaraan atau menyebabkan ketidakadilan.

(3) Adalah tugas hakim perbicaraan ketiga pada akhir kes pembelaan untuk: (i) dengan munasabah, elok dan secara kehakiman mempertimbangkan pembelaan berbanding kes pihak pendakwaan; (ii) memutuskan atas keseluruhan keterangan yang

dikemukakan dihadapan mahkamah; dan (iii) memutuskan sama ada pendakwaan telah membukitkan kesnya melampaui keraguan munasabah. Inilah sebabnya hakim perbicaraan ketiga membuat apa yang dibuatnya, untuk menilai keterangan pihak pendakwaan berbanding keterangan pembelaan dan selepas itu, menguji kesan keterangan pembelaan atas keterangan pendakwaan bagi menentukan sama ada pembelaan telah berjaya membangkitkan satu keraguan munasabah terhadap kes pihak pendakwaan.

(4) Pihak pendakwaan telah dengan jelasnya membuktikan unsur pertama pertuduhan. Keterangan ikut keadaan memadai menunjukkan bahawa perayu adalah orang yang menikam si mati. Ketidakjumpaan pisau yang digunakan untuk menikam si mati tidak memudaratkan mengambilkira pandangan hakim perbicaraan ketiga dalam menerima keterangan saksi-saksi pihak pendakwaan bahawa perayu telah dilihat memegang sebilah pisau pada tarikh dan masa berkenaan, dan telah melarikan diri dengan pisau yang berlumuran darah. Diambil secara keseluruhan, hakim perbicaraan ketiga betul dalam pendapatannya bahawa kesemua keterangan menuju ke arah kesimpulan bahawa perayu adalah orang yang telah menikam si mati. Tambahan, kenyataan si mati kepada pegawai perubatan bahawa perayu adalah orang yang telah menyerangnya telah diputuskan dengan betul sebagai akuan nazak.

(5) Kedalaman dan sifat kecederaan yang diakibatkan menunjukkan bahawa kecederaan atas si mati tersebut memang diniat oleh perayu dan bukanlah dilakukannya dengan tidak sengaja. Penilaian hakim perbicaraan ketiga terhadap keterangan adalah betul dan begitu juga dapatan yang telah dicapai oleh beliau. Tambahan, pembelaan telah dipanggil dengan betul oleh hakim perbicaraan kedua bagi alasan yang telah dinyatakan oleh hakim perbicaraan ketiga.

(6) Hakim perbicaraan ketiga betul dalam menolak pembelaan perayu bahawa beliau tidak mempunyai niat untuk membunuh si mati sebagai satu rekaan dan beliau juga betul dalam menilai keseluruhan kes ini sebelum mencapai kesimpulannya. Oleh itu, hakim perbicaraan ketiga telah mengarahkan mindanya atas isu-isu yang betul dan telah membuat inferens betul daripada fakta-fakta yang telah dibukti dan diterima.

[Kes terhadap perayu telah dibuktikan melampaui keraguan munasabah].

Case(s) referred to:
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 316(a), (b)
Penal Code, s. 302

For the appellant - Hisham Teh Poh Teik (Imran Hadzali Abd Hamid with him); M/s Elida Imran & Partners
For the respondent - Fatnin Yusof DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-80-2004]

Reported by Kumitha Abd Majid

JUDGMENT

Zaleha Zahari JCA:

[1] The appellant was tried before the Shah Alam High Court for murder in causing the death of Norzi Ayu binti Mohd Noor. On 11 November 2009 the appellant was convicted under s. 302 of the Penal Code and the mandatory sentence of death was imposed upon him. Hence this appeal.

[2] In view of the arguments of the appellant's counsel at the hearing of this appeal it is necessary to set out in brief the development of this case at the High Court and just before the hearing of this appeal before us.

[3] The record shows the slow pace of trial at the High Court was equally contributed by the prosecution, defence, as well as by reason of the transfer of trial judges and long dates given for the many adjournments. The trial commenced in October 2005. The prosecution had called 20 witnesses to testify in support of their case. The 1st trial judge had finished hearing all twenty of them. The minutes dated 16 July 2007 states that, by reason of the 1st trial judge being posted to Putrajaya with effect from 18 July 2007, with the consent of all parties, the 1st trial judge had the case transferred to another court (ie, court four) for the case to be continued for hearing before another High Court Judge.

[4] At that stage it was incumbent upon the succeeding judge who had conduct of the case to hear the submissions of the DPP and the defence counsel and to make a finding whether the prosecution had made a *prima facie* case against the appellant. The

A 2nd trial judge duly did so. She heard the submissions and delivered her decision on 19 June 2008. The 2nd trial judge ruled that the prosecution had proved a *prima facie* case against the appellant and called upon him to enter his defence. As to her reasoning in making the decision which she did, there is no record
B of her reasoning in the notes of evidence, neither was there any written grounds. The appellant's counsel stressed the fact that the 2nd trial judge in the situation she was in, did not have the benefit of hearing the prosecution witnesses in arriving at the decision which she did. The case was then fixed for continued hearing on
C 3 November 2008 and 4 November 2008 for the hearing of the defence.

[5] The record then shows that, as the 2nd judge was no longer then serving at Shah Alam High Court on the continued hearing
D date of 3 November 2008, the case was called before another judge. On this date the DPP informed the court that the Practicing Certificate of the defence counsel appearing for the appellant had been cancelled and that he was barred from practicing as an advocate and solicitor. On this date the appellant
E informed the court that he would like the trial to be continued before the 1st trial judge. The record shows that the appellant was informed that he was required to appoint another counsel to represent him; alternatively, asked whether he wanted a court appointed counsel. The appellant requested for a court appointed
F counsel. This development of course necessitated an adjournment. A new counsel was duly appointed in May 2009 to represent the appellant.

[6] In relation to the appellant's request that the case be
G continued before the 1st trial judge, we note that, in his judgment, the 3rd trial judge stated there was nothing he could do. The 3rd trial judge then heard the defence case; at the end of trial, the submissions, which concluded with a finding of guilt and conviction, which decision is the subject matter of appeal before
H us.

[7] The initial Memorandum of Appeal dated 11 March 2010 was directed against the decision of the 3rd trial judge on its merits. Be that as it may *vide* notice of motion in encl. (13) and thereafter in encl. (15), which was not objected to by the DPP,
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and allowed by the court on the date of hearing of the Appeal on 19 October 2011, additional grounds were added. The additional grounds were, that the 3rd trial judge had misdirected himself when he ruled in his written grounds that the prosecution has proved a *prima facie* case when there already existed an earlier ruling by the 2nd trial judge. By reason thereof it was contended the entire trial was a mistrial as the appellant had been deprived of the reasoning of the 2nd judge who had conduct of this case. It was then contended that the appellant had been deprived of a fair trial.

[8] We did not have the benefit of hearing the arguments of the appellant's counsel on the grounds advanced in the original Memorandum of Appeal as his arguments were confined to the new grounds added on the date of hearing of the appeal. As for the DPP's written submissions, understandably, it was directed to the merits of the case and did not address the grounds added on the date of hearing. We accordingly did not get much assistance from the DPP's submission on the express issue which formed the main thrust of the appellant's submissions.

The Appellant's Submissions

[9] The appellant's counsel submitted that the appellant had been severely prejudiced by reason of the trial being "fractured" and that such a "fractured" trial was not a fair trial, but a mistrial. According to him the appellant was also disadvantaged as he did not know why his defence was called by the 2nd judge who only heard submissions and who did not have the audio-visual advantage of hearing the prosecution's witnesses. The appellant was surely entitled to know the reasons why his defence was called, especially in a capital charge.

[10] He stressed the fact that the 3rd trial judge also did not have the benefit of hearing the testimony of the prosecution's witnesses, was not the person who heard the submissions of the defence counsel and that of the DPP at the end of the prosecution's case, as well as the fact that the 2nd trial judge had already made a ruling that the prosecution had made a *prima facie* case against the appellant and called upon the appellant to enter his defence. His reading of the 3rd trial judge's judgment was that the 3rd trial judge had reviewed the earlier ruling made by the learned 2nd trial judge in calling for defence, and made another ruling to the same effect by testing the evidence of the prosecution's witnesses which he himself did not hear.

[11] According to the appellant this was a misdirection, that it was not legally permissible for the 3rd trial judge to rule a second time and give reasons why a *prima facie* case had been proven. Like the 2nd trial judge, the 3rd trial judge equally did not enjoy the audio-visual advantage which the 1st trial judge had over the witnesses for the prosecution. The 2nd and 3rd trial judges were only left with the cold print of the notes of evidence. He submitted that without the audio-visual advantage of observing the demeanour or the body language of the prosecution witnesses it was difficult for both the 2nd and 3rd trial judges to resolve issues relating to the credibility of key witnesses, for instance, SP4 (Azman bin Mat Zain) and SP5 (Amri Sardi bin Yusof) who were together with the appellant in the flat of the deceased that fateful day in question.

[12] The appellant counsel was of the view that the entire trial was a mistrial. He urged this court to set aside the decision of the High Court and to direct a retrial.

Decision

[13] We have given the arguments raised by the appellant's counsel our very anxious consideration. The question we have to answer, is whether the error or irregularity complained of was of such a nature that it can be considered to be fatal and prejudicial to the appellant warranting a retrial? The powers of an appellate court to order a retrial is found in s. 316(a) and (b) of the Criminal Procedure Code. It is a discretionary power.

[14] A fresh trial means that everything would have to start afresh. All evidence are required to be tendered afresh to be decided upon by a new trial judge. There is no given yardstick to guide an appellate court as to when it should, or should not, order a retrial. Ultimately it is largely dependent on an appellate court's perception of what is the interest of justice of the case before it, and whether the preponderance of justice is against, or in favour, of a retrial.

[15] Our view is that the interest that is to be served by the power to order a retrial must be in the interests of the public. There are of course countervailing interests of justice which must be taken into consideration. The nature and strength of these will necessarily vary from case to case. We also had to bear in mind

that the interests of the public is also best served if persons who are guilty of serious crimes be brought to justice and not be allowed to escape because of technicalities in the conduct of trial.

[16] We must concede that such a "fractured" trial as in this case was certainly not to be repeated. Be that as it may, in our considered opinion after careful perusal of the record, notwithstanding the "fractured" trial, the appellant had been accorded a fair trial. The defence was represented throughout by competent counsel, and when not, another was appointed in his place. No complaint was made as to the conduct of the three trial judges in the handling of the case during the course of the hearing. A full transcript of the evidence had been recorded.

[17] On the absence of the reasoning of the 2nd trial judge in finding that the prosecution had made out a *prima facie* case, and the 3rd trial judge in his judgment making an appraisal of the evidence and making a second ruling that a *prima facie* case had been made out, we are of the view that the two rulings were not of such a nature that it vitiates the whole trial.

[18] Generally speaking under s. 180 Criminal Procedure Code, a trial judge is not required to give his reasons when ruling that a *prime facie* has been established against a person (See the decision of the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC). In our view the 2nd trial judge, when ruling that a *prima facie* case had been made out against the appellant, had expected, in all probability, to be able give her reasons for doing so when she came to write her judgment at the conclusion of the case. Unfortunately, due the 2nd trial judge having been transferred and no longer the presiding judge, she was unable to do so. The 3rd trial judge took over the hearing of this case until its conclusion. In the particular circumstances of this case, it is our view that the two rulings are not of such a feature and nature that vitiated the whole trial or caused a miscarriage of justice.

[19] The appellant complained that he was disadvantaged as he did not know why his defence was called by the 2nd trial judge. We do not agree with this submission. As we indicated earlier, when a defence is called, the court does not immediately give the accused person its reasons for doing so. Further, we draw attention to the fact that on those occasions where the prosecution has appealed against a ruling that a *prima facie* case

has not been established against an accused person, and the appellate court allows the appeal, the case is sent back to the trial court with a direction that the defence be called. In such instances, an accused person is none the wiser, why his defence is called as the appellate court does not normally give its reasons for its finding that a *prima facie* has been made out against an accused person, and the lack of such reasons is not open to attack as occasioning a failure of justice.

[20] Due recognition must be given to the fact that it was incumbent on the 3rd trial judge at the conclusion of the case for the defence to reasonably, properly and judicially consider the defence in the light of the prosecution's case and come to a decision on the totality of the evidence adduced before the court, to arrive at a decision whether the prosecution had proved its case beyond reasonable doubt. In our view it was for this reason the 3rd trial judge did what he did, to appraise the evidence for the prosecution in the light of the defence evidence, and to then test the impact of the latter on the former to determine whether the defence had succeeded in raising a reasonable doubt in the prosecution's case. The fact that the 3rd trial judge worded it in the manner which he did in his judgment, in our considered opinion, was not a matter warranting a retrial.

[21] In our view, the proper course of action for us to take in this case was to scrutinize the evidence and to determine whether the evidence support the findings of the respective trial judge at the respective stage, firstly, at the end of the prosecution's case, ie, whether the defence was rightly called, secondly, whether the High Court was right in the consideration of the defence in arriving at the conclusion, which it did.

[22] This case involved personal violence resulting in death. The prosecution had clearly proved the first ingredient of the charge. The death of Norzi Ayu binti Mohd Noor was confirmed by the attending medical officer (SP14) and the Investigating Officer (SP19). The post mortem report (exh. P42) and the testimony of the forensic pathologist SP16 confirmed that the deceased suffered massive blood loss due to injury to the main blood vessels (inferior vena cava) in the abdomen caused by stabbing with a sharp weapon.

[23] As to who stabbed the deceased, there were no eye witnesses who saw the appellant stabbing the deceased and cause the fatal injuries arising from which she died. Be that as it may, we are of the view that there was sufficient circumstantial evidence to show it was indeed the appellant that had stabbed the deceased.

[24] The recovery of a broken chainsaw piece at the front entrance of the flat established that someone had broken and entered into the deceased's flat. SP4's presence at the deceased's flat was in response to a note (exh. P13), as testified by SP6, which the deceased herself threw out to her, which note pleaded with SP6 to call the person named in the note (ie, SP4) to come over to the deceased's flat urgently. Upon entry into the deceased's flat, SP4 was confronted with the appellant holding a knife. That the appellant, still holding the knife, had locked himself in the bedroom for about 5-10 minutes together with the deceased, then, what SP4 found when he opened the bedroom door, the deceased lying injured on the bed.

[25] SP4 and SP5's testimony of the appellant managing to get out of the bedroom, of SP5 attempting to prevent the appellant escaping by keeping the grill closed, the appellant swinging the knife he was holding towards SP5 ("acah-acah pisau ke arah saya") were all very significant. SP5 had testified that the appellant escaped holding the bloodstained knife. SP5 and SP8 had chased him to a nearby river where the appellant managed to hide in some bushes.

[26] In our considered opinion the non-recovery of the knife was not fatal in view of the 3rd trial judge's acceptance of SP4 and SP5's testimony that the appellant was seen holding a knife on the date and time in question, and running away with a blood stained knife. Taken as a whole, we are of the view the 3rd trial judge was right in his reasoning that the evidence all point to the conclusion that the appellant was the person who had stabbed the deceased. The statement of the deceased to the medical officer SP14 that the appellant as the person who had attacked her, in our view, was correctly ruled as a dying declaration.

[27] On the issue of whether the appellant had the intention to kill, the evidence of SP13 states that upon examination there were two closely positioned and deep stab wounds to the deceased's

A abdomen. The post-mortem report (exh. P42) and the evidence of the forensic pathologist, SP16, states that the fatal injury inflicted was to the deceased's abdomen. The inferior vena cava/the main blood vessel was punctured. The puncture to the inferior vena cava was 1.5 cm in diameter indicating that the weapon used was B sharp and long. The injuries had resulted in massive blood loss which was difficult to stem, which ordinarily would cause death. The deceased died on the operating table a few hours after being brought to the hospital.

C **[28]** The depth and nature of the injury as testified by the forensic pathologist and the medical examiner was accepted as evidence that the injury was intentionally inflicted on the deceased by the appellant and not accidental. Any suggestion that the death of the deceased was due to negligence of the doctors who D attended to the deceased at the hospital was rejected. We are of the view that the 3rd trial judge's appraisal of the evidence was correct and so too were the findings which he arrived at. The defence was in this case rightly called, by the 2nd trial judge for the reasons stated by the 3rd trial judge.

E **[29]** As to whether the defence had raised a reasonable doubt against the prosecution's case, the defence was that there was no intention to kill and that the appellant had stabbed the deceased accidentally. The 3rd trial judge rejected the appellant's defence as F fictional for the reasons stated in his judgment. Our view on this issue is that he was right. He had correctly assessed the totality of the case, and in arriving at the conclusion which he did.

[30] To sum up, we find that the 3rd trial judge had directed his mind on the right issues and had drawn correct inferences from G the proved and admitted facts. The 3rd trial judge was right in finding that the appellant had not raised a reasonable doubt on the prosecution's case and that the case against the appellant had been proved beyond any reasonable doubt.

H **[31]** For the above reasons we dismissed the appeal and confirmed the decision of the 3rd trial judge.

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